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A Wal-Mart-Owned ILC: Why Congress Should Give the Green Light

I. INTRODUCTION

According to the Federal Deposit Insurance Corporation (FDIC), an estimated sixty million people in America do not possess adequate access to banking services.¹ As a result, these individuals tend to use “usurious check cashers, payday lenders and pawnbrokers” to satisfy their financial needs.² In 2009, 26% of U.S. households had inadequate or no access to banking services, and 71% of those that lacked access earned less than \$30,000 annually.³ The number of underbanked⁴ or unbanked households was significantly higher among minority populations: 54% of black households and 43% of Hispanic households were unbanked or underbanked in 2009.⁵ What is even more concerning is the increase in the number of individuals without adequate financial

1. See Sara Lepro, *New Face of the Underbanked Consumer*, AM. BANKER, June 10, 2010, available at 2010 WLNR 11766424 (Westlaw).

2. Rolfe Winkler et al., *Halls of Finance Fear Wal-Mart*, N.Y. TIMES, June 24, 2010, at B2; see also FED. DEPOSIT INS. CORP., FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 12 (2009) [hereinafter FED. DEPOSIT INS. CORP., FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS], available at http://www.fdic.gov/householdsurvey/full_report.pdf (maintaining that respondents who used check cashing and money orders cited the convenience, speed and cost as the reasons they used these services).

3. FED. DEPOSIT INS. CORP., FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS, *supra* note 2, at 11; see also Bob Koslow, *Banking on It: Wal-Mart Offers Savings While Cashing Checks, Paying Bills and Transferring Money*, DAYTONA NEWS-J., Apr. 18, 2010, at D1 (“Sixteen states have underbanked household rates above 20 percent. Alaska is the highest with a 25.5 percent underbanked rate followed by Mississippi, 25.2; South Carolina, 24.2; Texas, 24.1; and Washington, D.C., 23.9.”).

4. FED. DEPOSIT INS. CORP., FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS, *supra* note 2, at 10 n.6 (“Underbanked households are defined as those that have a checking or savings account but rely on alternative financial services. Specifically, underbanked households have used non-bank money orders, non-bank check-cashing services, payday loans, rent-to-own agreements, or pawn shops at least once or twice a year or refund anticipation loans at least once in the past five years.”).

5. *Id.* at 11.

services as well as the recent demographic shift within this category.⁶ For example, more members of the traditional middle-class lack access to banking largely because of the poor economy.⁷ Further, from 2005 to 2009, payday lender Advance America Cash Advance Centers Inc. (Advance America) observed the average age of its customers increase from thirty-nine years of age to forty-eight and the median household income increase from \$40,557 to \$50,000.⁸ Also, homeowners encompassed 69% of Advance America's business in 2009, up from 45% in 2005, and 91% of its customers were high school graduates, up from 86% in 2005.⁹

The underbanked and unbanked constitute only a fraction of the population in need of cost-efficient financial services.¹⁰ Customers currently using traditional banks are increasingly searching for inexpensive, dependable alternatives.¹¹ According to a 2010 J.D. Power and Associates satisfaction survey, among individuals who had access to financial services, only thirty-four percent of respondents were certain they would remain loyal to their banks over the course of twelve months.¹² Some observers suggest that this trend is due, in part, to a growing perception of banks as more concerned with increasing profits than providing good services.¹³ Others argue that customers are simply more sensitive to the cost of banking, and are increasingly willing to switch to cheaper suppliers that provide better customer service.¹⁴ However, experts expect the number of banks in the United States to decrease from more than 7,000 in 2010 to an estimated 4,300 by 2015,¹⁵ and as a consequence, Americans will find it more difficult

6. See Lepro, *supra* note 1.

7. *Id.*

8. *Id.*

9. *See id.*

10. See *Financial Services on Aisle Nine: Wal-Mart Gives Banks a Run for Their Money*, KNOWLEDGE@WHARTON (Sept. 1, 2010), <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2583>.

11. *Id.*

12. J.D. POWER & ASSOCS., 2010 RETAIL BANKING SATISFACTION STUDY (2010), <http://www.jdpower.com/finance/articles/2010-Retail-Banking-Satisfaction-Study/>.

13. *See id.* (citing poor customer service and high bank fees as the most common reasons people switched banks).

14. *See id.*

15. OLIVER WYMAN, STATE OF THE FINANCIAL SERVICES INDUSTRY 2010 32 (2010) (on file with author).

to gain access to financial institutions that offer quality services at a reasonably-low cost.¹⁶

With \$405 billion in revenues and more than 200 million shoppers per week,¹⁷ Wal-Mart Stores, Inc. (Wal-Mart) is well positioned to take advantage of the increasing demand for low-cost financial services.¹⁸ Although Wal-Mart has failed to acquire a bank charter on several occasions, the mega-retailer has taken innovative steps to offer financial services without a charter.¹⁹ However, in the summer of 2010, Congress included provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)²⁰ prohibiting certain commercial entities from acquiring any sort of bank charter for at least three years.²¹ Because of Dodd-Frank, Wal-Mart cannot currently provide traditional banking services.²² Nevertheless, Wal-Mart continuously finds alternative means to increase its market share in the industry²³ and provide financial services to financially underserved citizens that local, community banks are unable or unwilling to provide.²⁴ When Dodd-Frank's moratorium expires in 2013, Congress should permit Wal-Mart to utilize an Industrial Loan Company (ILC)²⁵ as long as the retailer and the ILC

16. See *Financial Services on Aisle Nine: Wal-Mart Gives Banks a Run for Their Money*, *supra* note 10.

17. *About Us*, WAL-MART, <http://walmartstores.com/AboutUs/> (last visited Jan. 14, 2011).

18. See, e.g., John Engen, *Wal-Mart Gets Serious*, U.S. BANKER, Sept. 1, 2010, available at 2010 WLNR 17407972 (noting that many of the underbanked and unbanked populations fall within demographics that Wal-Mart currently targets).

19. See *Financial Services on Aisle Nine: Wal-Mart Gives Banks a Run for Their Money*, *supra* note 10.

20. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S.C.).

21. *Id.* § 603 (to be codified at 12 U.S.C. § 1815 note).

22. See John L. Ropiequet et al., *An Introduction to the Dodd-Frank Act—The New Regulatory Structure For Consumer Finance Emerges*, 29 No. 8 BANKING & FIN. SERVICES POL'Y REP. 1, 1, 7 (2010).

23. See, e.g., Engen, *supra* note 18.

24. See *Financial Services on Aisle Nine: Wal-Mart Gives Banks a Run for Their Money*, *supra* note 10.

25. See 12 U.S.C. § 1841(c)(2)(H) (2006) (excluding ILCs from the definition of a bank); MELANIE L. FEIN, SECURITIES ACTIVITIES OF BANKS § 2.01(J)(7) (3d ed. 2001 & Supp. 2011) (explaining that ILCs are entities, chartered by a small number of states, with bank-like qualities and flexible financial powers, including the power to make certain consumer and commercial loans).

maintain an arm's-length relationship that is monitored by an FDIC equipped with the authority to enforce current banking laws more strictly.²⁶

The purpose of this Note is to review Wal-Mart's efforts to enter the financial services industry, and to discuss why Congress should reconsider its resistance towards Wal-Mart's financial advance. Part II will chronicle actions taken by Wal-Mart over the last fifteen years to acquire or establish a banking charter, discuss regulatory and legislative responses to those endeavors, and explore the underlying motives for the negative scrutiny.²⁷ Part III will assess the effects of Dodd-Frank on this mega-retailer's banking aspirations.²⁸ Part IV will examine the current state of Wal-Mart's financial capabilities as well as the economic benefits associated with its financial expansion.²⁹ In Part V, the Note will discuss why Congress should not eliminate the ILC exception, but instead, permit Wal-Mart to reapply and proceed with its application for a limited bank charter.³⁰ Finally, in Part VI, the Note concludes that Congress should enact legislation permitting Wal-Mart to acquire or establish an ILC.³¹

II. WAL-MART'S PRIOR ATTEMPTS

The primary argument against permitting Wal-Mart to operate a bank is the long-held prohibition against mixing commerce and banking.³² However, as is the case with most rules, there have been exceptions.³³ The existence of entities

26. See Lawrence J. White, *Should Wal-Mart, Real Estate Brokers, and Banks Be in Bed Together? A Principles-Based Approach to the Issues of the Separation of Banking and Commerce* 7 (N.Y. Univ. Stern Sch. of Bus., Working Paper EC-07-21, 2007), available at <http://w4.stern.nyu.edu/emplibrary/7-21.pdf>.

27. See *infra* Part II.

28. See *infra* Part III.

29. See *infra* Part IV.

30. See *infra* Part V.

31. See *infra* Part VI.

32. See, e.g., Zachariah J. Lloyd, Note, *Waging War with Wal-Mart: A Cry for Charge Threatens the Future of Industrial Loan Corporations*, 14 FORDHAM J. CORP. & FIN. L. 211, 224-235 (2008).

33. See, e.g., Joseph G. Haubrich & João A. C. Santos, *Alternative Forms of Mixing Banking with Commerce: Evidence from American History*, 12 FIN. MARKETS, INSTITUTIONS & INSTRUMENTS 121, 144 (2003), available at <http://onlinelibrary.wiley.com/doi/10.1111/1468-0416.00002/pdf>.

concurrently engaged in both commercial endeavors and activities associated with traditional financial institutions demonstrates an absence of strict separation.³⁴ A commercial company's ownership or control of a single thrift³⁵ is an example of an arrangement used by commercial companies to acquire banking powers.³⁶

A. Wal-Mart's Application for a Unitary Thrift Holding Company

In 1967, Congress passed the Savings and Loan Holding Company Act (SLHCA), which, among other things, prohibited companies that held more than a single thrift "from engaging in nonbanking activities, as well as certain financial activities such as underwriting insurance and securities."³⁷ But, this statute failed to subject unitary thrift holding companies (owning only a single thrift institution) to restrictions prohibiting nonbanking activities, as long as the activity "did not pose a safety and soundness risk to the thrift subsidiary."³⁸ Thus, the SLHCA did not restrict unitary thrift holding companies to the nonbanking activities described in the Act.³⁹ Gradually, more nonbanking companies, including securities firms, commercial retailers, and insurance companies became unitary thrift holding companies to provide insured deposits and other traditional banking services to their customers.⁴⁰ Simultaneously, traditional banking entities, namely community banks, persistently voiced their hostility towards the SLHCA's nonbanking activities exception for unitary thrift

34. See generally *id.* at 147 (reviewing the development of the "nonbank bank" loophole, the circumstances that led to the passing of the Competitive Equality Banking Act of 1987, and the redefinition of banks to include an institution that is either insured by the FDIC or offers demand deposits and makes commercial loans).

35. See 12 U.S.C. § 1841(i) (2006) (defining a thrift).

36. See Haubrich & Santos, *supra* note 33, at 122 ("In general, there are at least five different possibilities . . . for mixing banking with commerce: (1) a bank owns a firm; (2) a bank controls a firm; (3) a firm owns (or controls) a bank; (4) a person controls both a bank and a firm; and (5) a holding company controls both a bank and a firm.").

37. *Id.* at 151.

38. *Id.*

39. See JULIE L. WILLIAMS & SCOTT ZESCH, SAVINGS INSTITUTIONS: MERGERS, ACQUISITIONS AND CONVERSION § 2.01(5) (2010), available at SAVIMA § 2.01 (Westlaw).

40. See Arthur E. Wilmarth, *Wal-Mart and the Separation of Banking and Commerce*, 39 CONN. L. REV. 1539, 1585 (2007).

holding companies.⁴¹ Under these conditions, Wal-Mart made its first major attempt to enter the financial industry.⁴²

In June of 1999, Wal-Mart filed an application with the Office of Thrift Supervision (OTS) to acquire a thrift charter in Oklahoma using the so called “unitary thrift loophole.”⁴³ Wal-Mart’s thrift application triggered intense uproar on the part of community banks and others within the financial industry,⁴⁴ who feared that Wal-Mart would “invade bankers’ turf and steal their customers” if permitted to operate a thrift.⁴⁵ Congress subsequently took action to close the unitary thrift loophole in the form of amendments to the SLHCA, included in the Gramm-Leach-Bliley Act (GLBA), which subjected unitary thrift holding companies to the same restrictions on nonbanking activities as multiple thrift holding companies.⁴⁶ In addition, Congress permitted unitary thrift holding institutions that existed before May 4, 1999 as well as those that applied with the OTS for a unitary thrift holding charter before May 4, 1999 to be “grandfathered,” or to continue “to be free of restrictions on the types of activities [the institution] may conduct.”⁴⁷ Congress further excluded unitary thrift holding companies involved in inherently financial activities from restrictions imposed on institutions carrying out commercial or industrial activities.⁴⁸ Thus, although Congress still permits various financial institutions to operate thrifts, Wal-Mart, applying a month after the cut-off date,⁴⁹

41. See Daniel O’Rourke, *Surprise-Surprise: Wal-Mart Wants a Bank*, MONDAQ, Aug. 22, 2002, available at 2002 WLNR 8947275.

42. See *id.*

43. See Alan Kline, *Community Bankers Hail the Defeat of Unitary Thrifts -- and Wal-Mart*, AM. BANKER, Oct. 26, 1999, available at 1999 WLNR 2773897 (Westlaw).

44. See *id.*

45. Kline, *supra* note 43 (noting that it was generally recognized that the GLBA would open up banking to commerce by allowing more banks, insurance companies, and brokerage houses into each other’s businesses).

46. 12 U.S.C. § 1467a(c)(9)(A) (2006); Rob Blackwell, *Wal-Mart, TD: Could They Make It Work?*, AM. BANKER, Jan. 3, 2002, available at 2002 WLNR 3120690 (Westlaw).

47. WILLIAMS & ZESCH, *supra* note 39; see also Lawrence J. White, *The Gramm-Leach-Bliley Act of 1999: A Bridge Too Far? Or Not Far Enough?* 43 SUFFOLK U. L. REV. 937, 943 (2010).

48. 12 U.S.C. § 1467a(c)(9)(A).

49. Although the OTS maintained that it would continue considering Wal-Mart’s application until the GLBA became law on November 12, 1999, some suggest

continues to be prohibited from acquiring a thrift due to the commercial nature of its operations.⁵⁰

B. Wal-Mart's Attempts to Acquire an Industrial Loan Company Charter

Another tool used by nonbanking, nonfinancial companies to provide traditional banking services is an ILC.⁵¹ ILCs “are state-chartered organizations that have bank-like characteristics and flexible powers,” including the power to make certain consumer and commercial loans.⁵² Additionally, the FDIC, their federal regulator, may insure ILC deposits, but the state where it is chartered is the primary regulator.⁵³ Only seven states permit companies to charter ILCs, but most ILCs are headquartered in California and Utah.⁵⁴ In order to be excluded from the definition of a “bank” under the Banking Holding Companies Act (BHCA),⁵⁵ the ILC must either not accept demand deposits or limit its total assets to less than \$100 million.⁵⁶ A company that

Congress included the amendments to the SLHCA in the GLBA and selected the May, 1999, cut-off partially to prevent Wal-Mart, who applied for a thrift in June, 1999, from operating a thrift. See Lloyd, *supra* note 32, at 224 n.93.

50. See Michele Heller, *ILC Debate Heating Up, Wal-Mart Application, GAO Study Provide Fuel*, AM. BANKER, Aug. 30, 2005, available at 2005 WLNR 13911583 (Westlaw).

51. See FEIN, *supra* note 25.

52. *Id.*

53. WILLIAM D. JACKSON, CONG. RESEARCH SERV., RL 32767, INDUSTRIAL LOAN COMPANIES/BANKS AND THE SEPARATION OF BANKING AND COMMERCE: LEGISLATIVE AND REGULATORY PERSPECTIVES 1 (2005) [hereinafter JACKSON RL 32767], available at http://assets.opencrs.com/rpts/RL32767_20050627.pdf.

54. Fed. Deposit Ins. Corp., *Advisory Committee on Banking Policy: Industrial Loan Companies (ILCs)*, <http://www.fdic.gov/about/learn/advisorycommittee/ilc060204.html> (last updated Feb. 26, 2009) [hereinafter Fed. Deposit Ins. Corp., *Advisory Committee on Banking Policy*] (stating that among the states that permit ILCs to be chartered include Colorado, California, Hawaii, Indiana, Minnesota, Nevada and Utah).

55. See Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 363 (1986) (quoting 12 U.S.C. § 1841(c) (2006)) (“Section 2(c) of the Banking Holding Company Act defines ‘bank’ as any institution ‘which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans.’”).

56. See 12 U.S.C. § 1841(c)(2)(H); Edward D. Herlihy et al., *Financial Institution M&A 2009: Convergence, Consolidation, Consternation and Complexity in an Industry in Transition an Annual Review of Leading Developments*, in PRACTICING LAW INSTITUTE, A GUIDE TO FINANCIAL INSTITUTIONS 2010: NAVIGATING THE NEW

controls an ILC does not control a “bank” as defined in the BHCA, and is not subject to restrictions on nonbanking activities.⁵⁷ Thus, a nonfinancial, commercial company such as Wal-Mart may acquire or establish a bank charter by acquiring an ILC.⁵⁸

ILCs are remnants of twentieth-century methods of financing industrial enterprises.⁵⁹ Industrial companies used the ILCs to satisfy their borrowing demands, which traditional banks were unable to satisfy at the time.⁶⁰ In 1958, the FDIC began to insure a few ILCs,⁶¹ and in 1988, the agency expanded its financial safety net to insure all large ILCs “operating safely.”⁶²

Many nonfinancial institutions use ILCs to provide traditional banking services without subjecting themselves to BHCA restrictions on the sorts of nonbanking activities that they may undertake.⁶³ Moreover, because an ILC’s controlling shareholder is not subject to the BHCA, companies that own ILCs are not subject to Federal Reserve Board (the Fed) supervision.⁶⁴ But, the ILCs themselves are subject to federal regulation in the same manner and to the same extent as state nonmember banks.⁶⁵ In 2009, fifty-six FDIC-insured ILCs existed in the United States.⁶⁶ Sears, Volvo, Toyota, and GE Capital are among the companies

LANDSCAPE 267, 579-81 (2010), available at 1800 PLI/Corp 267 (Westlaw); Mindy West, *The FDIC’s Supervision of Industrial Loan Companies: A Historical Perspective*, FED. DEPOSIT INS. CORP., http://www.fdic.gov/regulations/examinations/supervisory/insights/sisum04/industrial_loans.html (last updated June 25, 2004) (noting that an Industrial Loan Company may avoid regulation as a bank if control of the institution was not acquired by any company after August 10, 1987).

57. See 12 U.S.C. § 1841(c)(2)(H).

58. See Fed. Deposit Ins. Corp., *Advisory Committee on Banking Policy*, *supra* note 54 (outlining the powers, advantages and limits of ILCs).

59. JACKSON RL 32767, *supra* note 53, at 6; see also West, *supra* note 56 (explaining that the first ILC was established in 1910 in Norfolk, Virginia by Arthur J. Morris, and Morris called it the Fidelity Savings and Trust Company of Norfolk, Virginia).

60. See JACKSON RL 32767, *supra* note 53, at 7.

61. See West, *supra* note 56.

62. See JACKSON RL 32767, *supra* note 53, at 7.

63. See FEIN, *supra* note 25.

64. See West, *supra* note 56.

65. Ed Royce & Jim Matheson, *Congress Shouldn’t Shackle Industrial Loan Companies*, AM. BANKER, May 16, 2003, available at 2003 WLNR 4174995 (Westlaw).

66. Fed. Deposit Ins. Corp., *Advisory Committee on Banking Policy*, *supra* note 54.

that hold ILCs.⁶⁷ Two former investment firms, Goldman Sachs and Morgan Stanley owned ILCs prior to the 2008 financial collapse, but converted their ILC charters to bank charters in September 2008.⁶⁸ These investment firms found it necessary to convert their ILC charters in order to subject themselves to oversight by the Fed under the BHCA, which was necessary to reassure investors during this unstable period.⁶⁹ The firms also wanted to participate in the Treasury's Troubled Asset Relief Program (TARP).⁷⁰

ILCs may offer several financial services, including demand deposits, if the ILC has less than \$100 million in assets⁷¹ and negotiable order of withdrawal (NOW) accounts, which function like checking accounts,⁷² without subjecting the holding company to nonbanking limitations under the BHCA.⁷³ However, included among an ILC's deficiencies are its inability to offer traditional checking accounts, lack of branching powers, and its inability to exploit federal preemption of state laws.⁷⁴

In 2002, Wal-Mart attempted to acquire a California-chartered ILC named Franklin Bank, but opponents in California and within Congress immediately objected to the potential mix of

67. FEIN, *supra* note 25.

68. Because financial circumstances were unusual and exigent, the Fed quickly approved Goldman Sachs's and Morgan Stanley's bank applications after the Fed determined that the investment firms and their subsidiaries were adequately capitalized, their CRA ratings were "satisfactory" and "outstanding" respectively, and their nonbank activities were "financial in nature" as required by section 4(k) of the BHCA. See Order Approving Formation of Bank Holding Companies, 94 FED. RES. BULL. C101, C102-103 (2008), available at 2008 WL 7861871; *Id.* C103, C104-106 (2008), available at 2008 WL 7861872.

69. See Steven Sloan, *Reviving The Banking-Commerce Debate*, AM. BANKER, Nov. 21, 2008, available at 2008 WLNR 22185695 (Westlaw).

70. *Id.*; see also Alexander C. Hart, *Warning on TARP Funds: The Treasury is Unlikely to be Repaid All of the Money Lent Under the Program*, the Inspector General Says, L.A. TIMES, Sept. 25, 2009, available at 2009 WLNR 18915577 (maintaining that the goal of TARP was to stabilize the economy by purging banks' balance sheets of toxic assets, and noting that Goldman Sachs received more than \$10 billion in TARP funds, which it quickly repaid).

71. West, *supra* note 56.

72. Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 363, 368 (1986) (observing that NOW accounts have qualities that are similar to traditional checking accounts, but because they require prior notice before withdraw, they do not afford depositors a legal right to withdraw on demand).

73. *Id.* at 363, 367 (1986); Herlihy et al., *supra* note 56, at 579.

74. Herlihy et al., *supra* note 56, at 582.

banking and commerce.⁷⁵ California subsequently passed legislation prohibiting nonfinancial institutions from acquiring or establishing state-chartered industrial banks unless the acquiring companies were “engaged only in the activities permitted for financial holding companies, as provided in . . . the federal Gramm-Leach-Bliley Act”⁷⁶ Due to Wal-Mart’s extensive retailing operations,⁷⁷ this restriction removed any possibility of the mega-retailer gaining a charter in California. However, no such restriction existed in the state of Utah.⁷⁸

In July 2005, Wal-Mart filed an application with the Utah Department of Financial Institutions to charter an ILC in Utah,⁷⁹ and simultaneously applied for Federal Deposit Insurance with the FDIC.⁸⁰ According to Wal-Mart, its primary purpose in acquiring an ILC was to promote greater efficiency and effectiveness in its credit, debit, and electronic check transactions, which was projected to save it more than \$700 million annually.⁸¹ Wal-Mart’s application provoked significant backlash from various representatives of the banking industry.⁸² According to one report, bank officials and watchdog organizations sent 1,500 letters to the FDIC “protesting Wal-Mart’s banking charter application.”⁸³ Ultimately, Congress held hearings on the issue of whether to continue excluding parent companies of ILCs from the BHCA’s restrictions on nonbanking activities.⁸⁴ In addition, the House of Representatives introduced and passed legislation that would

75. See Thomas J. Bliley, Jr., *A Wal-Mart-Owned Bank Would Set Bad Precedent*, AM. BANKER, Aug. 16, 2002, available at 2002 WLNR 3161504 (Westlaw).

76. Cal. Fin. Code § 701.1 (West 2009).

77. *About Us*, *supra* note 17.

78. See FEIN, *supra* note 25.

79. See Steven Oberbeck, *Wal-Mart Applies to Launch a Bank in Utah*, SALT LAKE TRIB., July 19, 2005, 2005 WLNR 11298039 (Westlaw).

80. See Application for Deposit Insurance for Wal-Mart Bank, 71 Fed. Reg. 10,531, 10,532 (Mar. 1, 2006).

81. See Engen, *supra* note 18.

82. *Financial Services on Aisle Nine: Wal-Mart Gives Banks a Run for Their Money*, *supra* note 10.

83. *Id.* (referencing a CNN report from 2005).

84. See generally *ILC’s—A Review of Charter, Ownership, and Supervision Issues: Hearing Before the H. Fin. Serv. Subcomm. on Fin. Institutions and Consumer Credit*, 109th Cong. 1 (2006) [hereinafter *ILC’s Hearing*], available at <http://democrats.financialservices.house.gov/media/pdf/109-106.pdf>.

“limit ownership of ILCs by commercial companies”⁸⁵ Although the legislation ultimately failed,⁸⁶ the FDIC subsequently issued a six-month moratorium preventing certain commercial companies from acquiring an ILC,⁸⁷ which was later extended another year.⁸⁸ Due to the intense scrutiny surrounding Wal-Mart’s attempt to acquire a bank charter and the FDIC’s institution of the moratorium, the mega-retailer withdrew its application for an ILC charter in March of 2007.⁸⁹

III. DODD-FRANK’S MARK ON ILCs

President Barack Obama signed Dodd-Frank into law on July 21, 2010.⁹⁰ Many regard the Act as the “most sweeping financial regulatory reform in both scope and impact since the Great Depression.”⁹¹ Congress designed Dodd-Frank to increase the government’s capacity to minimize systemic risk to the financial industry, oversee institutions that provide financial services more thoroughly, and provide greater protections for consumers.⁹² Dodd-Frank rearranges the regulatory framework by

85. FEIN, *supra* note 25; Business Checking Account Freedom Act, H.R. 1224, 109th Cong. (2006).

86. See H.R. 1224; *H.R. 1224: Business Checking Freedom Act of 2005*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h109-1224> (last visited Feb. 7, 2011).

87. See Press Release, Fed. Deposit Ins. Corp., FDIC Places Six-Month Moratorium on Industrial Loan Company Applications and Notices (July 28, 2006), available at <http://www.fdic.gov/news/news/press/2006/pr06073.html> (“The FDIC put the moratorium in place to provide time to assess developments in the ILC industry, to determine if any emerging safety and soundness or policy issues exist[ed] involving ILCs, and to evaluate whether statutory, regulatory or policy changes need[ed] to be made in the oversight of these charters. The moratorium also allow[ed] the agency time to further evaluate the various issues, facts and arguments raised in connection with the ILC industry, and to assess whether statutory or regulatory changes or revised standards and procedures for ILC applications and supervision . . . [were] needed to protect the deposit insurance fund.”).

88. Joe Adler, *Cerberus Application May Renew ILC Tensions: Without Moratorium, FDIC Appears Divided Along Old Fault Lines*, AM. BANKER, June 10, 2010, available at 2008 WLNR 11822634 (Westlaw).

89. See Eric Dash, *Wal-Mart Abandons Bank Plans*, N.Y. TIMES, Mar. 17, 2007, at C1.

90. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S.C.).

91. Ropiequet et al., *supra* note 22, at 1.

92. *Id.*

mandating both existing and newly-fashioned regulatory agencies to conduct more than fifty studies relating to both the American and global financial system.⁹³ In addition, the Act directs these regulatory agencies to draft, adopt, and implement more than 240 regulations, which will continue to alter the financial landscape for many years.⁹⁴

Title VI of Dodd-Frank, entitled the Bank and Savings Association Holding Company and Depository Institution Regulatory Improvements Act of 2010, calls for several studies concerning the risky activities of institutions Congress has determined to be potential threats to the security of the financial sector.⁹⁵ Section 603 of Dodd-Frank orders the Government Accountability Office (GAO) to institute a study investigating whether Congress should discard current exceptions to the BHCA and expand the definition of a “bank holding company” (BHC) to encompass entities such as ILC holding companies.⁹⁶ The GAO is required to determine the types and number of companies that fall within the scope of the exception and identify the “size, geographic location, commercial affiliates, and their federal supervisor” of each such company.⁹⁷ Section 603 also examines whether the current regulatory scheme governing institutions excluded from the BHCA is sufficient to prevent these institutions from placing the financial system in significant systemic danger as well as the possible consequences of subjecting these institutions to the same restrictions required of banks.⁹⁸

93. See Press Release, Howell Reeves & Kathleen A. Johnson, Duane Morris LLP, U.S. Fin. Reform: Capital Requirements for Fin. Institutions (Aug. 24, 2010), http://www.duanemorris.com/alerts/financial_reform_financial_institution_requirements_3764.html.

94. ROBERT KURUCZA, GOODWIN PROCTOR LLP, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 1 (2010), http://www.goodwinprocter.com/~media/Files/Publications/Newsletters/Financial%20Services%20Alert/2010/doddfrank_7_28_2010_PDF.pdf.

95. Dodd-Frank Act § 603 (to be codified at 12 U.S.C. § 1815 note).

96. *Id.* § 603(b); see M. MAUREEN MURPHY, CONG. RESEARCH SERV., RL R41339, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: TITLES III AND VI, REGULATION OF DEPOSITORY INSTITUTIONS AND DEPOSITORY INSTITUTION HOLDING COMPANIES 6 (2010) [hereinafter MURPHY RL R41339], available at <http://www.llsdc.org/attachments/files/225/CRS-R41339.pdf>.

97. MURPHY RL R41339, *supra* note 96, at 6-7; Dodd-Frank Act § 603(b) (to be codified at 12 U.S.C. § 1815 note).

98. Dodd-Frank Act § 603(b) (to be codified at 12 U.S.C. § 1815 note); see also

Section 603 of Dodd-Frank also establishes a three-year moratorium preventing the FDIC from approving any deposit insurance application for a “new credit card bank, industrial bank, or trust bank or any application for change in control of any existing institution of those types that . . . [would result in a] ‘commercial firm’ acquir[ing] control of the institution.”⁹⁹ Section 603 provides some exceptions to the change of control prohibitions.¹⁰⁰ The exceptions involve companies that are in danger of defaulting, circumstances such as mergers or the full acquisition of the commercial company, and a change in control resulting from the acquisition of less than twenty-five percent of voting stock in the commercial company that owns the excluded entity.¹⁰¹ In order to take advantage of these exceptions, however, those involved in the acquisition must gain regulatory approval prior to the acquisition.¹⁰²

Section 603 of Dodd-Frank prohibits Wal-Mart and other commercial institutions currently seeking to establish or acquire an ILC from moving forward with their objectives, unless they fall within one of the three aforementioned exclusions.¹⁰³ Even assuming Wal-Mart places itself in the position to somehow exploit one of these exceptions, the retailer would probably fail to obtain approval from regulatory agencies that, prior to Congress’s moratorium, instituted their own moratorium preventing commercial entities from acquiring an ILC as a direct result of the

MURPHY RL R41339, *supra* note 96, at 6 (“Among the exceptions that GAO is to study are (1) state-chartered banks owned by thrift associations and limited to taking deposits for thrift associations; (2) a bank controlled by a trust company or mutual savings bank in the same state as of December 31, 1970, provided that, subject to an exception for investments authorized for national banks, the trust company or mutual savings bank does not acquire any interest in a company which would give it 5% of the voting shares of the company; (3) institutions which function only in a trust or fiduciary capacity, subject to certain activities restrictions; (4) credit card banks; (5) industrial loan companies; and (6) savings associations.”).

99. MURPHY RL R41339, *supra* note 96, at 6 (defining “commercial firm” as an institution which gains eighty-five percent or more of its annual revenue from operations a part from depository institution operations and other financial activities).

100. Dodd-Frank Act § 603(a) (to be codified at 12 U.S.C. § 1815 note).

101. *Id.*

102. *Id.*

103. See MURPHY RL R41339, *supra* note 96, at 6.

public scrutiny surrounding Wal-Mart's past attempts.¹⁰⁴ Section 603 of Dodd-Frank essentially prevents Wal-Mart from establishing or acquiring an ILC or any alternative banking charter through the summer of 2013.¹⁰⁵

IV. WAL-MART'S THIRD WAY

Although Dodd-Frank and other previous congressional and administrative actions have precluded Wal-Mart from gaining a bank charter outright, Wal-Mart has adopted alternative means to provide its customers with low-cost, efficient financial services without a bank charter.¹⁰⁶ Examples include the introduction of various "MoneyCenters"¹⁰⁷ in many of Wal-Mart's nationwide branches;¹⁰⁸ the acquisition of a minority stake in Green Dot Corporation (Green Dot),¹⁰⁹ a prepaid card provider that services many of Wal-Mart's customers;¹¹⁰ and \$25,000 small business loans offered by Sam's Club, a subsidiary of Wal-Mart.¹¹¹ When asked about its banking aspirations in the past, Jane Thompson, president of Wal-Mart's financial services division,¹¹² stated that Wal-Mart wishes to offer banking services to "provide greater efficiency, effectiveness and safety in Wal-Mart's interaction with the payments systems . . . [and] nothing more."¹¹³ However, the aforementioned actions suggest something more.

104. See FEIN, *supra* note 25.

105. See Dodd-Frank Act § 603(a) (to be codified at 12 U.S.C. § 1815 note).

106. See *Financial Services on Aisle Nine: Wal-Mart Gives Banks a Run for Their Money*, *supra* note 10.

107. See *infra* Part IV.A (examining Wal-Mart's MoneyCenter operations).

108. Steve Bills, *Wal-Mart's Bill Pay Sets Stage for a Finance Push*, AM. BANKER, Aug. 26, 2009, available at 2009 WLNR 16585667 (Westlaw).

109. See *infra* Part IV.B (explaining Wal-Mart's partnership with Green Dot).

110. Maria Aspan, *Wal-Mart Cuts Fees to Lure Banks' Clients*, AM. BANKER, Feb. 19, 2009, available at 2009 WLNR 3172207 (Westlaw).

111. Press Release, Sam's Club Tests Online Small Business Loan Program for Main Street (July 6, 2010), available at <http://www.prnewswire.com/news-releases/sams-club-tests-online-small-business-loan-program-for-main-street-97835989.html>; see also Anna Gelpern, *Wal-Mart Bank in Mexico: Money to the Masses and the Home-host Hole*, 39 CONN. L. REV. 1513, 1514 (2007) (discussing the acquisition of a bank charter by Walmex, the Mexican division of Wal-Mart, which is another example of Wal-Mart's attempts to build up its financial capacity).

112. Koslow, *supra* note 3 (observing that Wal-Mart's financial services unit was established in 2002).

113. Engen, *supra* note 18 (quoting Jane Thompson's testimony regarding the

A. Wal-Mart MoneyCenters

Wal-Mart MoneyCenters are dedicated spaces inside Wal-Mart's stores that offer financial services, including check cashing, money orders, bill payment, and money transfers, through partnerships with financial companies, such as Green Dot, MoneyGram International Inc., and Fiserv Inc., a financial technology company.¹¹⁴ In September of 2004, Wal-Mart opened its first MoneyCenter "as a way to consolidate the financial services in one area of the store, improve customer traffic flows [sic] and provide more privacy for customer transactions."¹¹⁵ Thompson stated that the "MoneyCenters . . . were specially created to give customers a welcoming environment where they can save when they cash checks, pay bills and transfer money."¹¹⁶ As of March 16, 2010, there were MoneyCenters in more than 1,000 stores nationwide.¹¹⁷

Thompson estimates that in a typical week, these MoneyCenters process three to five million financial transactions.¹¹⁸ Wal-Mart MoneyCenters offer money transfers, money orders, check-cashing services,¹¹⁹ and CheckFreePay walk-in bill services.¹²⁰ The MoneyCenters also provide prepaid Visa debit cards via Wal-Mart's partnership with Green Dot.¹²¹ According to Wal-Mart, customers that took advantage of the MoneyCenters saved an estimated \$450 million in 2009.¹²² Perhaps, if Wal-Mart continues to establish MoneyCenters in its

motives behind Wal-Mart's application for an ILC during a 2006 hearing at the FDIC).

114. Press Release, Wal-Mart Stores, Inc., Walmart Opens 1000th Walmart MoneyCenter, Announces 500 More for 2010 (Mar. 16, 2010), available at <http://walmartstores.com/pressroom/news/9702.aspx>; see Bills, *supra* note 108.

115. Koslow, *supra* note 3.

116. *Id.* (quoting Jane Thompson in a 2009 press release stating the goal of the MoneyCenters).

117. Press Release, Wal-Mart Stores, Inc., *supra* note 114.

118. Koslow, *supra* note 3.

119. Maria Aspan, *No Charter? No Problem for Wal-Mart*, AM. BANKER, Dec. 4, 2009 [hereinafter Aspan, *No Problem for Wal-Mart*], available at 2009 WLNR 22615057 (Westlaw).

120. Bills, *supra* note 108.

121. Koslow, *supra* note 3; see also *infra* Part IV.B (examining Wal-Mart's partnership with Green Dot).

122. Koslow, *supra* note 3.

stores, which it plans to do,¹²³ then the retailer's customers will continue to save money using this financial alternative.

Wal-Mart MoneyCenters are an affordable means for unbanked or underbanked individuals to access financial services.¹²⁴ Underbanked individuals, often described as "lower-income individuals who live paycheck to paycheck and are too poor to afford or even need sophisticated financial services,"¹²⁵ have been largely ignored by traditional banks that tend to target "middle-class and affluent consumers."¹²⁶ The underbanked and nonbanked could find cheaper alternatives to traditional banks by using Wal-Mart MoneyCenters.¹²⁷

B. Wal-Mart and Green Dot

Headquartered in Los Angeles, California, Green Dot is America's leading prepaid card provider, issuing products such as MasterCard- and Visa-branded prepaid reloadable debit cards.¹²⁸ A prepaid debit card is the functional equivalent of a typical credit or debit card, but prepaid users may utilize them only if there are preloaded funds on the card.¹²⁹ Generally, prepaid debits providers, such as Green Dot, do not provide lines of credit to their prepaid customers.¹³⁰ Therefore, once a prepaid user depletes

123. See Press Release, Wal-Mart Stores, Inc., *supra* note 114.

124. Engen, *supra* note 18; see also Lepro, *supra* note 1 (maintaining that within the category of the underbanked are low-income people consisting of numerous immigrants; individuals who have horrible credit or who are unsatisfied with their banking arrangements; and young people inexperienced with banking).

125. Lepro, *supra* note 1 ("The prevailing definition [of the term "underbanked"] has been: consumers who don't fully participate in mainstream financial services, who may have a checking or savings account with a traditional bank and little else.").

126. *Id.*

127. See Engen, *supra* note 18. But see David Lazarus, *Wal-Mart Deal is Better than Check Cashers*, S.F. CHRON., June 24, 2007, at C1, available at 2007 WLNR 11879197 (explaining that, at one point, Wal-Mart attempted to exclude itself from a federal law prohibiting financial institutions from redlining, or denying financial services or credit to people in low-income neighborhoods, but later abandoned those efforts).

128. *Corporate Profile*, GREEN DOT CORP., <http://ir.greendot.com/phoenix.zhtml?c=235286&p=irol-homeProfile&t=&id=&> (last visited Sept. 24, 2010).

129. See *FAQs*, GREEN DOT CORP., <https://www.mygreendot.com/greendot/help#what> (last visited Sept. 24, 2010).

130. See, e.g., *id.*

the funds, she must reload the card or purchase a new prepaid card, both of which can be done at various retail stores,¹³¹ including Wal-Mart.¹³² As of June 2010, 50,000 Wal-Mart locations sold Green Dot prepaid cards.¹³³

In 2007, Wal-Mart and Green Dot entered into a partnership granting Green Dot access to Wal-Mart's prepaid card business.¹³⁴ This partnership has resulted in an increased market share in the prepaid debit industry for both parties.¹³⁵ Access to Wal-Mart's immense customer base facilitated a fifty percent growth in Green Dot's Wal-Mart business between July 2009 and March 2010, "accounting for [sixty-three percent] of Green Dot's quarterly revenue."¹³⁶ Green Dot's access to the American consumer through Wal-Mart has been particularly beneficial for Green Dot because it does not operate in any offices of its own.¹³⁷

Wal-Mart's benefit from this business relationship is also significant.¹³⁸ First, Wal-Mart pays ninety percent of its 1.4 million employees by directly depositing weekly paychecks onto prepaid cards supplied by Green Dot.¹³⁹ Further, considering that two million Wal-Mart customers used prepaid cards in 2009 and the low cost of these prepaid cards,¹⁴⁰ Wal-Mart's partnership with Green Dot could position the mega-retailer to increase its market share in the growing prepaid debit business.¹⁴¹

The importance of Green Dot's success to Wal-Mart was made most evident when Wal-Mart acquired a minority ownership

131. *See id.*

132. MICHELLE JUN, CONSUMER FED'N OF AMERICA AND NAT'L LAW CTR., PREPAID CARDS: SECOND-TIER BANK ACCOUNT SUBSTITUTES 9 (2010), available at <http://www.defendyourdollars.org/Prepaid%20WP.pdf>.

133. *See Walmart Expands Card Presence with Equity Stake in Prepaid Provider Green Dot*, DATAMONITOR WIRES, June 23, 2010, available at 6/23/10 DATAMCPYMTW 15:39:00 (Westlaw).

134. *Id.*

135. *Id.*

136. *Id.*

137. *See John Adams, An FI by Any Other Name*, BANK TECH. NEWS, Aug. 1, 2010, available at 2010 WLNR 15386340.

138. *See Walmart Expands Card Presence with Equity Stake in Prepaid Provider Green Dot*, *supra* note 133.

139. *Id.*

140. Aspan, *No Problem for Wal-Mart*, *supra* note 119; *see also* Koslow, *supra* note 3 (observing that as of April, 2010, Wal-Mart sold their prepaid cards for \$3).

141. *See Aspan, No Problem for Wal-Mart*, *supra* note 119.

stake in Green Dot in May 2010. Although the quantity of shares was too little to give Wal-Mart substantial control over the prepaid provider, the acquisition still raised questions as to Wal-Mart's motives.¹⁴² The acquisition discomfited those within the financial industry due in part to the fact that the announcement came some months after Green Dot filed an application with the Fed to obtain 100 percent voting shares in Bonneville Bankcorp.¹⁴³ If the Fed approved the application, Green Dot would gain voting shares in Bonneville Bank, a Utah-based, community bank, and become a BHC.¹⁴⁴ This would permit Green Dot to label its prepaid products as bank accounts, presumably making them more attractive.¹⁴⁵ This is because the FDIC treats all funds underlying stored value cards and other nontraditional access mechanisms, including prepaid debit cards, as "'deposits' to the extent that the funds have been placed at an insured depository institution."¹⁴⁶ Therefore, if Green Dot acquired or established a bank, then the FDIC would treat each of its prepaid card users as FDIC-insured depositors.¹⁴⁷ Furthermore, according to one expert, Green Dot's bank could "enable Wal-Mart to extend more automated point of sale financial services such as payments or savings accounts."¹⁴⁸ Others claim that the acquisition of the bank would permit Green Dot to offer incremental amounts of credit, which would allow Wal-Mart's customers to establish lines of credit at the retailer's locations through Green Dot.¹⁴⁹

142. See Adams, *supra* note 137.

143. See Press Release, Bd. of Governors of the Fed. Reserve Sys., Actions of the Board, Its Staff, and the Federal Reserve Banks; Applications and Reports Received No. 9 (Feb. 27, 2010), available at <http://www.federalreserve.gov/Releases/H2/20100227/h2.pdf>.

144. See *Walmart Expands Card Presence with Equity Stake in Prepaid Provider Green Dot*, *supra* note 133 ("Green Dot explicitly claims that it will use the bank to push its cards and additional services, including savings accounts, on a pilot basis, to its core customer base."); Press Release, Bd. of Governors of the Fed. Reserve Sys., *supra* note 143.

145. See Adams, *supra* note 137.

146. FDIC General Counsel's Opinion No. 8 Insurability of Funds Underlying Stored Value Cards and Other Nontraditional Access Mechanisms, 73 Fed. Reg. 67,155, 67,157 (Nov. 13, 2008).

147. See *id.*

148. Adams, *supra* note 137 (quoting Beth Robertson, a director at Javelin Research).

149. *Id.* (quoting Red Gillen, a senior analyst at Celent).

Green Dot's acquisition or establishment of a bank would not make Wal-Mart subject to regulation by the Fed as a BHC. Green Dot only sold one percent of its voting securities to Wal-Mart.¹⁵⁰ The BHCA defines a "bank holding company" as a "company which has control over any bank or over any company that is or becomes a bank holding company."¹⁵¹ Under the Act, a company "has control" over a bank or BHC if: (1) it directly or indirectly owns twenty-five percent or more of the voting shares of any class of stock of the bank or BHC; (2) it controls in any manner the election of a majority of the bank or BHC board of directors or trustees; or (3) the Fed determines the company directly or indirectly exercises a "controlling influence over management or policies" of the bank or BHC.¹⁵² Moreover, the Fed shall presume no control exists if the company owns less than five percent of the voting securities in the bank or BHC.¹⁵³ Thus, because Wal-Mart controls less than five percent of the voting securities in Green Dot and Wal-Mart would not play a role in managing the bank or the BHC,¹⁵⁴ Wal-Mart would not constitute a BHC under the BHCA if Green Dot were to establish or acquire a bank. Wal-Mart would also not be subject to Fed oversight over its nonbank activities.¹⁵⁵

Admittedly, significant dangers associated with prepaid debit cards do exist.¹⁵⁶ However, Green Dot, Wal-Mart, and Congress, could and should take steps to increase protections afforded to prepaid customers.¹⁵⁷ For example, Green Dot and Wal-Mart should make information regarding certain hidden charges associated with its prepaid cards, such as out-of-network

150. *Id.*

151. 12 U.S.C. § 1841(a)(1) (2006).

152. *Id.*

153. *See id.* § 1841(a)(3).

154. Andrew Johnson, *Green Dot: Wal-Mart Won't Have Bank Operating Role*, AM. BANKER, June 17, 2010, available at 2010 WLNR 12249655 (Westlaw).

155. *See* 12 U.S.C. § 1843(c)(6); Damian Paletta, *Fed Rating Revamp Fuels Fears of Turf War*, AM. BANKER, Dec. 2, 2004 (noting that the Fed is a BHC's primary regulator), available at 2004 WLNR 13586795 (Westlaw).

156. *See generally* Andrew Martin, *Prepaid, but Not Prepared for Debit Card Fees*, N.Y. TIMES, Oct. 6, 2009, at A1 (summarizing the evolution of prepaid cards, and discussing reasons why there should be increased regulation protecting prepaid card users).

157. *See id.*

withdrawal fees and replacement card fees, more accessible to their customers.¹⁵⁸ In addition, Congress should expand protections contained in the Electronic Funds Transfer Act (EFTA)¹⁵⁹ to encompass prepaid cards.¹⁶⁰ This would afford important error resolution rights¹⁶¹ as well as protections against unauthorized use to prepaid card users.¹⁶²

This being said, according to Consumers Union, a nonprofit publisher of consumer reports, Wal-Mart does offer its prepaid customers the most economical prepaid service among major prepaid card providers.¹⁶³ Wal-Mart also provides protections against unauthorized use as well as error resolution rights that are similar, although not as broad, to those afforded by the EFTA.¹⁶⁴ Finally, Dodd-Frank does subject stored value cards to the regulatory oversight of the Bureau of Consumer Financial Protection (BCFP).¹⁶⁵ Indeed, under section 1002 of the Act, selling, providing, or issuing a stored value card is a financial product or service, so the provider is subject to BCFP oversight.¹⁶⁶ The Act expressly includes prepaid debit cards within the

158. See JUN, *supra* note 132, at app. A.

159. Electronic Fund Transfers Act, 15 U.S.C. § 1693 (2006). Section 1022 of Dodd-Frank transfers rulemaking authority under the EFTA to the BCFP. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022, 124 Stat. 1376, 1980 (2010) (to be codified at 12 U.S.C. § 5512).

160. See JUN, *supra* note 132, at 14-15.

161. *Id.* at 15 (explaining that under the EFTA, if a debt or credit card consumer is not afforded error resolution rights, missing funds must be replaced within a specified period of time).

162. *Id.* at 14.

163. See *id.* at 11-13 (comparing fees associated with Wal-Mart's prepaid cards with to fees associated with cards offered by other providers, and concluding that Wal-Mart's prepaid cards were cheaper overall).

164. See *id.* at 15-16 (noting that Wal-Mart reserves the right to change or rescind these rights and protections at any time and for any reason).

165. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1002(15)(A)(v), 124 Stat. 1376, 1958 (2010) (to be codified at 12 U.S.C. § 5481) (defining products or services that subject institutions to BCFP oversight). The purpose of the BCFP is to implement and enforce “[f]ederal consumer financial law[s] consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.” *Id.* § 1021(a) (to be codified at 12 U.S.C. § 5511).

166. Dodd-Frank Act § 1002(15)(A)(v) (to be codified at 12 U.S.C. § 5481); see also *id.* § 1011 (to be codified at 12 U.S.C. § 5491) (granting the BCFP regulatory oversight over the offering and provision of products or services that are financial in nature and targeted at consumers).

definition of “stored value” cards.¹⁶⁷ Hence, prepaid card providers, including Green Dot, are subject to oversight by the BCFP.

Some observers have viewed Wal-Mart’s financial partnership with Green Dot as a clear sign of Wal-Mart’s continued interest in providing financial services to its customers.¹⁶⁸ Green Dot’s prepaid debit cards offer Wal-Mart’s targeted financial customers a low-cost, efficient alternative to traditional debit and credit cards and their associated fees.¹⁶⁹ Underbanked individuals unhappy with their present banking arrangements or living “on a cash basis” increasingly find prepaid cards more attractive than credit cards and debit cards.¹⁷⁰

V. CONGRESS SHOULD PERMIT WAL-MART TO ACQUIRE AN ILC

Banks play an important role in our society.¹⁷¹ As the center of economy’s payment system, banks have “constant creditor-borrower relationships among themselves,”¹⁷² which provides the primary mechanism used to build wealth.¹⁷³ But, it also opens banks to potential losses and the dangers of preemptive runs resulting from the actions of other banks.¹⁷⁴ In addition, their combination of illiquid assets and liquid liabilities leave banks vulnerable to bank runs,¹⁷⁵ which significantly harm both banks and unsophisticated depositors.¹⁷⁶ Congress has enacted special constraints on banks and other financial institutions to ensure the

167. Dodd-Frank Act § 1002(28)(A) (to be codified at 12 U.S.C. § 5481).

168. See Adams, *supra* note 137 (speculating on the benefits of Wal-Mart’s equity stake in Green Dot).

169. See Aspan, *supra* note 110.

170. *Financial Services on Aisle Nine: Wal-Mart Gives Banks a Run for Their Money*, *supra* note 10 (quoted language).

171. White, *supra* note 26, at 4.

172. *Id.*

173. See generally Raghuram G. Rajan, *Why Banks Have a Future: Toward a New Theory of Commercial Banking*, 9 JOURNAL OF APPLIED CORP. FIN. 114 (1996) (discussing two core banking activities: taking demand deposits and originating non-marketable loans).

174. White, *supra* note 26, at 4.

175. Section 335 of Dodd-Frank is intended to prevent bank runs by increasing the maximum deposit insurance amount from \$100,000 to \$250,000. See Dodd-Frank Act, sec. 335, § 11(a)(1)(E) (to be codified at 12 U.S.C. § 1821(a)(1)(E)).

176. White, *supra* note 26, at 4-5.

safety and soundness of these institutions.¹⁷⁷ In an effort to limit risk taking, these legislative and regulatory actions have, among other things,¹⁷⁸ limited the types of activities that banks and other financial institutions, and their owners, can perform.¹⁷⁹ However, as discussed in Part II.B,¹⁸⁰ Congress exempted ILCs from the activities restrictions required of banks.¹⁸¹ When Dodd-Frank's moratorium expires in 2013, Congress should not eliminate the ILC exception,¹⁸² but continue excluding ILC holding companies from nonbanking restrictions. Congress should also permit Wal-Mart to establish or acquire an ILC because ample protections against potentially risky transactions between any ILC and the parent company already exist.¹⁸³

As with any FDIC-insured institution, there will be risks associated with Wal-Mart's potential ILC, but current rules governing inter-affiliate relationships and other restrictions on ILCs would adequately minimize that risk.¹⁸⁴ Although Wal-Mart's retail activities would be free from regulatory oversight, the FDIC's oversight authority over the potential ILC would be undisputed.¹⁸⁵ Wal-Mart's ILC would need to comply with both

177. *Id.* at 5 (stating that keeping banks safe and sound requires banks to maintain solvency, which requires ensuring that their assets remain greater than their liabilities).

178. *See id.* at 6 (“At the heart of the safety-and-soundness regulation are four key components: (a) minimum capital . . . requirements, to keep banks solvent; (b) limitations on activities . . . ; (c) management competency requirements, to prevent inadvertent insolvencies; and (d) in-the-field examiners and supervisors, to enforce the rules.”).

179. *See* 12 U.S.C. § 24 (Seventh) (2006) (limiting banks to incidental powers that are necessary to carry on the business of banking); 12 C.F.R. 225.21 (2008) (limiting BHCs and BHC subsidiaries to activities that are closely related to banking); 12 U.S.C. § 1843(n)(1) (limiting financial holding companies to activities that are financial in nature).

180. *See supra* Part II.B.

181. 12 U.S.C. § 1841(c)(2)(H); *see also supra* text accompanying notes 55-58 (describing the ILC exception to the definition of a “bank” under the BHCA).

182. The specific language in § 603(b) provides for a study to determine whether Congress should eliminate the ILC exemption “in order to strengthen the safety and soundness of institutions or the stability of the financial system.” Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 603(b), 124 Stat. 1376, 1598 (2010) (to be codified at 12 U.S.C. § 1815 note).

183. *See White, supra* note 26, at 7.

184. *See ILC's Hearing, supra* note 84, at 157-59 (statement of Douglas H. Jones, Acting General Counsel, Federal Deposit Insurance Corporation).

185. *See id.* at 78-79 (statement of Jim Matheson, Rep., U.S. House of

state and federal regulatory controls that currently provide for the safety and soundness of any such institution.¹⁸⁶ For instance, current regulatory requirements hold the senior management of any FDIC-insured ILC responsible for ensuring that the ILC complies with regulations.¹⁸⁷ Additionally, the FDIC has established measures that it may require of proposed ILCs that will be “owned by or significantly involved in transactions with commercial or financial companies.”¹⁸⁸ These include: (1) establishing an independent board of directors; (2) maintaining knowledgeable, experienced, and independent executive officers; and (3) drafting a business plan tailored to the ILC’s potentially complex needs and unaffiliated with the parent.¹⁸⁹ Thirdly, ILCs must abide by the requirements of section 23A and section 23B of the Federal Reserve Act (FRA),¹⁹⁰ which limit risks to an insured depository institution, including an ILC,¹⁹¹ from transactions with its affiliates, including but not limited to its parent company.¹⁹² These two provisions also prevent ILCs from transferring to its affiliates the “subsidy arising from the institution’s access to the Federal safety net.”¹⁹³ For example, if Wal-Mart or a Wal-Mart subsidiary made poor credit decisions on loans, later found to pose a significant risk of default,¹⁹⁴ any purchase of those assets by the ILC from Wal-Mart would be a covered transaction under sections 23A and 23B.¹⁹⁵ Therefore, section 23A would prohibit the ILC

Representatives).

186. West, *supra* note 56.

187. *Id.*

188. *Id.*

189. *Id.*

190. Federal Reserve Act §§ 23A-23B, 12 U.S.C. § 371c (2006).

191. 12 U.S.C. § 1828(j); see also LISSA L. BROOME & JERRY W. MARKHAM, REGULATION OF BANK FINANCIAL SERVICE ACTIVITIES: CASES AND MATERIALS at 243-44 n. 47 (3^d ed. 2008) (“Congress amended the Federal Deposit Insurance Act in 1966 to extend Section 23A to insured nonmember banks.”).

192. 12 C.F.R. § 223.2(a)(1) (2008) (defining an affiliate to include parent companies, which are companies that control a bank).

193. Application of Sections 23A and 23B of the Federal Reserve Act to Derivative Transactions With Affiliates and Intraday Extensions of Credit to Affiliates, 66 Fed. Reg. 24,229, 24,230 (May 11, 2001) (to be codified at 12 C.F.R. pt. 250).

194. See Kevin K. Nolan, Note and Comment, *Wal-Mart’s Industrial Loan Company: The Risk to Community Banks*, 10 N.C. BANKING INST. 187, 206 (2006).

195. See 12 U.S.C. § 371c(b)(3)(B)(7).

from buying the bad assets because section 23A bars ILCs from purchasing low-quality assets from any affiliate.¹⁹⁶ Moreover, section 23B prohibits ILCs from entering into a transaction with an affiliate that is not an arm's length transaction or better from the perspective of the bank.¹⁹⁷ Also, pursuant to section 10(b) of the Federal Deposit Insurance Act (FDIA) the FDIC has the authority to examine any affiliate of the institution, including the parent company, for purposes of determining (i) "the relationship between [the] depository institution and any such affiliate" and (ii) the "effect of such relationship on the depository institution."¹⁹⁸ Pursuant to section 10(c) of the FDIA, "individuals, corporations, partnerships, or other entities that in any way affect the institution's affairs or ownership may be subpoenaed and required to produce documents."¹⁹⁹ Finally, the ILC would be subject to consumer protection regulations as well.²⁰⁰ These rules and regulations require ILCs to organize their management in a manner that creates an autonomous and self-reliant institution.²⁰¹ The rules also ensure that ILCs are placed under the same limitations required of traditional financial institutions; thus, preventing significant unfair competitive advantages in favor of Wal-Mart.²⁰²

There are also specific standards that ILCs must satisfy to receive Federal deposit insurance. Principally, section 6 of the FDIA requires the FDIC to assess the financial history and condition of the ILC, the adequacy of its capital structure, its future earnings prospects, the character of its management, the convenience and needs of its community, and the degree to which its corporate powers are consistent with the purposes of the

196. *Id.* § 371c(a)(3). A low-quality asset is defined as an asset (1) that is classified as "substandard", "doubtful", or "loss"; (2) that is in a nonaccrual status; (3) that has principal or interest payments that are more than thirty days overdue; or (4) whose terms have been renegotiated or compromised as a result of the deteriorating financial condition of the obligor. *Id.* § 371c(b)(10).

197. 12 U.S.C. § 371c.

198. Federal Deposit Insurance Act § 10(b), 12 U.S.C. § 1820(b).

199. West, *supra* note 56; *Id.* § 10(c), 12 U.S.C. § 1820(c).

200. *ILC's Hearing*, *supra* note 84, at 157 (statement of Douglas H. Jones, Acting General Counsel, Federal Deposit Insurance Corporation).

201. *Id.* at 158-59.

202. See *supra* notes 187-201 and accompanying text.

FDIA.²⁰³ “The FDIC generally follows the same review process for applications for deposit insurance . . . relative to ILCs as it does for such requests from other applicants,”²⁰⁴ and the agency will deny Federal insurance to ILCs that pose unacceptable risks to the Federal deposit insurance fund even if the ILC is eligible for Federal deposit insurance.²⁰⁵

The FDIC also has some robust enforcement powers, including the ability to prohibit an ILC from carrying out activities with its parent company that have the potential to put the ILC and the FDIC financial safety net in jeopardy.²⁰⁶ Included in this power is the ability to “provide reimbursement, indemnification, or guarantee against loss; dispose of any asset involved; rescind agreements or contracts; [and to] take such other action as the agency determines to be appropriate,” including but not limited to a complete divestiture.²⁰⁷ Under the Prompt Corrective Action provisions of the FDIA, if the FDIC finds that the ILC is significantly undercapitalized, the FDIC may order affirmative remedies, including dismissing the executive officers and directors as well as the divestiture by the parent company.²⁰⁸ If the FDIC found that Wal-Mart was utilizing the ILC in a manner that was inconsistent with safe and sound practices, the powers discussed²⁰⁹ would give the FDIC ample authority to stabilize the ILC and enforce current banking laws and regulations.²¹⁰

203. Federal Deposit Insurance Act § 6, 12 U.S.C. § 1816.

204. *ILC's Hearing*, *supra* note 84, at 161 (statement of Douglas H. Jones, Acting General Counsel, Federal Deposit Insurance Corporation).

205. *See* Federal Deposit Insurance Act § 5, 12 U.S.C. § 1815(a)(5) (“If the Board of Directors votes to deny any application for insurance by any depository institution, the Board of Directors shall promptly notify the appropriate Federal banking agency and, in the case of any State depository institution, the appropriate State banking supervisor of the denial of such application, giving specific reasons in writing for the Board of Directors’ determination with reference to the factors described in section 1816 of this title.”).

206. *See ILC's Hearing*, *supra* note 84, at 159-61 (statement of Douglas H. Jones, Acting General Counsel, Federal Deposit Insurance Corporation).

207. *Id.* at 160

208. 12 U.S.C. § 1831o(f)(2)(I).

209. *See supra* text accompanying notes 206-208.

210. *See ILC's Hearing*, *supra* note 84, at 157-61 (statement of Douglas H. Jones, Acting General Counsel, Federal Deposit Insurance Corporation).

As the top company on *Fortune's* Global 500 list in 2010 and with sales in excess of \$405 billion,²¹¹ Wal-Mart is clearly a well-capitalized company that is unlikely to collapse and place an FDIC-insured ILC in danger.²¹² Moreover, if an institution of Wal-Mart's magnitude acquired an ILC, the FDIC would surely utilize its supervisory and enforcement powers to ensure that such an institution would not threaten the stability of the ILC. Some argue that a top-down "consolidated supervision" approach would be necessary to promote the safety and soundness of any ILC, which is not possible with the bottom-up scheme currently in place.²¹³ But, this would require close monitoring and supervision over the parent company's commercial activities even when there is no investigation involving the ILC.²¹⁴ As a result, financial regulators would often be pulled into the business of overseeing commercial activities, a function outside the scope of their expertise and purpose.²¹⁵ Nevertheless, if Congress determines that the Federal government does not have the necessary tools to adequately supervise ILCs and their holding companies, "then enacting legislation to provide the regulators with the necessary authority and/or the resources to develop the needed capabilities is the best response – rather than to prevent these potentially productive ownership arrangements."²¹⁶

For example, Congress could delegate greater authority to the Financial Stability Oversight Counsel (FSOC) to designate a nonbanking parent company of an ILC a systemically significant

211. Brian O'Keefe, *Meet the CEO of the Biggest Company on Earth: Wal-Mart's Mike Duke. Will His Colossal Company Be the First to Hit \$500 Billion in Sales?*, FORTUNE, Sept. 27, 2010, at 80, 84.

212. *Id.* Section 38A of Dodd-Frank would require Wal-Mart to use its financial stability as a source of financial strength for the ILC. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 38A, 124 Stat. 1376, 1616 (2010) (to be codified at 12 U.S.C. § 1831o-1).

213. See *ILC's Hearing*, *supra* note 84, at 117-26 (statement of Rick Hillman, Director, Financial Markets and Community Investment, U.S. Government Accountability Office).

214. See *id.* at 23.

215. See White, *supra* note 26, at 33.

216. White, *supra* note 26, at 12 (arguing that if regulators monitor a bank closely, determine a transaction between the parent and the bank to be at arm's-length, and severely penalize violations of banking laws, then Congress should permit bank owners to carry out nonbanking activities).

nonbank financial company under section 113 of Dodd-Frank, which in turn, would subject the company to Fed oversight under section 115 of the Act. This would, perhaps, deter Wal-Mart from drastically growing its financial capabilities once it established or acquired an ILC. The FSOC,²¹⁷ established in section 989E of Dodd-Frank, is responsible for identifying systemically significant financial institutions, including systemically significant nonbank financial companies.²¹⁸ The FSOC may designate a nonbank institution a systemically significant financial institution if eighty-five percent of the company's consolidated revenue or assets derive from activities that are financial in nature.²¹⁹ This designation requires a supermajority vote as well as an affirmative vote by the Secretary of the Treasury.²²⁰ Once a company is designated a systemically significant nonbank financial company, it is subject to Fed registration, reporting, examination, and enforcement requirements.²²¹ Such a company would also be subject to heightened prudential standards, including heightened capital, leverage, and liquidity requirements²²² as well as periodic stress testing.²²³ If Wal-Mart established or acquired an ILC, it would not be susceptible to FSOC designation as a systemically significant nonbank financial company because too few of its consolidated revenue or assets derive from financial activities.²²⁴

However, Congress could reduce the percentage of revenue requirements for institutions that own ILCs. This would serve as a deterrent preventing Wal-Mart from developing into a predominately-financial institution. In addition, this would provide the Fed with the authority and tools necessary to more swiftly and directly manage a large, Wal-Mart-like company that poses a systemic risk to the financial industry due to its ILC

217. See Dodd-Frank Act § 989E (to be codified as 12 U.S.C. app. 11).

218. *Id.* § 113 (to be codified at 12 U.S.C. § 5323).

219. *Id.* § 102 (to be codified at 12 U.S.C. § 5511).

220. *Id.* § 113 (to be codified at 12 U.S.C. § 5323).

221. *Id.* § 115 (to be codified at 12 U.S.C. § 5325).

222. *Id.*

223. Dodd-Frank Act § 165(i) (to be codified at 12 U.S.C. § 5365).

224. See *id.* § 102 (to be codified at 12 U.S.C. § 5511); O'Keefe, *supra* note 211 (illustrating the magnitude of Wal-Mart's global retail operations).

activities.²²⁵

Wal-Mart's banking activities would have a substantial effect on community banks and others in the financial sector.²²⁶ Opponents of Wal-Mart's ILC often point to local, mom-and-pop merchants, driven out of business by Wal-Mart because of their inability to compete with the mega-retailer's volume discount pricing strategy,²²⁷ as an example of what could happen to community-based banks if Congress permits Wal-Mart to acquire or establish an ILC.²²⁸ These individuals argue that Wal-Mart would drive out community banks or credit unions in communities where Wal-Mart offers financial services, and as a result, reduce competition, eliminate jobs, and export deposits out of local communities.²²⁹ Accordingly, as Wal-Mart gained a greater share of local financial markets, it could raise prices, and competitors would have difficulty entering the market and undercutting Wal-Mart due to the relatively high barriers to entry in banking.²³⁰

Community banks, however, presently face a similar threat from large financial institutions carrying on banking and commercial activities through affiliates due to the GLBA, yet many continue to do business.²³¹ Furthermore, community banks made similar arguments against permitting an expansion of permissible nonbanking activities for holding companies under the BHCA prior to the enactment of the GLBA, yet the advent of

225. Alan W. Avery et al., *Dodd-Frank Act Attempts to Curtail Systemic Risk*, 127 BANKING L. J. 766, 776-77 (Sept. 2010).

226. Oral Testimony of Terry J. Jorde, Chairman, Indep. Cmty. Bankers of America, Proposed Wal-Mart Bank's Application For Federal Deposit Insurance: Hearing Before the Federal Deposit Insurance (Apr. 10, 2006) [hereinafter Oral Testimony of Terry J. Jorde], <http://www.icba.org/files/ICBASites/PDFs/test041006oral.pdf>.

227. Anthony Bianco & Wendy Zellner, *Is Wal-Mart Too Powerful?*, BUS. WK., Oct. 6, 2003.

228. Oral Testimony of Terry J. Jorde, *supra* note 226.

229. Nolan, *supra* note 194, at 196-97.

230. *Id.* at 194, 197 ("Wal-Mart has shown a pattern of entering local communities and using competitive pricing and other techniques to reduce local competition. Once local competition has diminished or has been eliminated altogether, Wal-Mart often raises its prices or sometimes shuts down its stores in order to open larger regional stores.").

231. See Kline, *supra* note 43 (stating that community banks generally recognized that the GLBA would open up banking to commerce by allowing more banks, insurers, and brokerage houses into each other's businesses).

financial holding companies did not send a large number of community banks and credit unions into insolvency.²³² Similarly, Wal-Mart ILC would not push a significant number of community banks out of business, but instead, would offer beneficial financial services to many unbanked and underbanked consumers.²³³

VI. CONCLUSION

Congress should permit Wal-Mart to establish an ILC to facilitate greater access to financial services by the unbanked and underbanked. The benefits to underserved financial customers as well as to those not currently participating in the financial sector would be tremendous.²³⁴ Moreover, there exists substantial examination, compliance and supervisory safeguards against the risk of harm from a Wal-Mart-owned ILC.²³⁵ The sheer size of Wal-Mart “combined with a bank charter could make Wal-Mart a force to be reckoned with for traditional banks,”²³⁶ and, perhaps, provide a competitive spark that would push traditional banking companies to provide financial services for those currently underserved or without banking services.

Modern financial legislation authorizing financial institutions to carry on commercial activities through their affiliates demonstrates how the wall between banking and commerce continues to crumble.²³⁷ Through these enactments,

232. See Douglas V. Austin, *Can Community Banks Compete with Financial Holding Companies?*, MICH. BANKER, Sept. 1, 2000, available at 2000 WLNR 7405781; Douglas V. Austin, *GLBA: Is It The Death of The Community Bank?*, HOOSIER BANKER, May 31, 2000, available at 2000 WLNR 4318733 (discussing why community banks believed they would get out-competed by financial holding companies).

233. See *supra* notes 1-16, 124-27, 169-70 and accompanying text.

234. See *supra* notes 1-24, 124-27, 169-70 and accompanying text.

235. See *supra* Part V.

236. *Financial Services on Aisle Nine: Wal-Mart Gives Banks a Run for Their Money*, *supra* note 10 (quoting Stephen J Hoch, a Wharton marketing professor and director of the Baker Retailing Initiative).

237. See Kline, *supra* note 43. For example, the GLBA allows banks, through their financial subsidiaries, to purchase equity stakes in exclusively commercial companies for investment purposes. 12 U.S.C. § 1843(k)(4)(H) (2006) (permitting the buying and selling of equity stakes as long as it is for investment purposes and the bank does not routinely get involved in managing the company in which the investment is made, except as necessary to obtain a reasonable return). A bank's financial subsidiary may also carry out activities generally perceived to be

Congress has shown its willingness to overlook the traditional practice of separating banking and commerce.²³⁸ Congress should not use this outdated justification to eliminate the ILC exception. Instead, Congress should continue permitting commercial entities to acquire or establish ILCs because such institutions do not pose a significant risk to the safety and soundness of the Federal Deposit Insurance Fund. If Congress believes that the government should increase supervision over ILC parent companies, then it should delegate the necessary authority to the FDIC or the Fed, rather than eliminate the exception altogether.²³⁹

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commercial, including real estate brokerage and operating a travel agency because such actions are considered “financial in nature” as defined by the GLBA. 12 U.S.C. § 24a; *see also* 12 U.S.C. § 1843(k)(4) (listing activities that are financial in nature).

238. *See supra* note 237 and accompanying text.

239. White, *supra* note 26, at 12.